IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 187 OF 2005

Prakash V.Jain and another. ... Appellants.

Versus.

The Municipal Corporation of
Greater Mumbai and another. ... Respondents.

Shri J.Rais with Shri Rajesh Kachare for the Appellants.

Ms.Geeta Joglekar for the Respondent No.1-BMC..

CORAM : ABHAY S. OKA, J.

DATED : 15th March, 2005.

P.C.:

1. Admit. The Respondent No.1 waives service. Shri Rais the learned Counsel appearing for the Appellants states that he is not pressing the Appeal as against the Respondent No.2, who is one of the co-Plaintiffs.

2. The challenge in this Appeal is to the Judgment and order dated 14th January 2005 by which the Notice of Motion taken out by the Appellants for temporary injunction has been dismissed.

3. The challenge in the suit filed by the Appellants and the Respondent No.2 is to the Notice dated 19th July 1994 issued under section 351 of the Bombay Municipal Corporation Act 1888 and the subsequent order dated 20th March 1998 passed on the basis of the said notice. The allegation in the Notice under section 351 is of

unauthorised enclosure and covering of set back terrace portion described therein. The case of the Appellants is that they purchased Flat No.92 in Advent Building, Jagannath Bhosale Marg, Mumbai by an agreement dated 7th April 1995 executed by one Surendra J.Kapoor and the Appellants were placed in possession of the said flat on 12th January 1996. The case of the Appellants is that after taking possession of the flat they have not carried out any construction or additions or alterations to the flat. A reply was sent by the said Surendra J.Kapoor on 1st August 1994 to the notice under section 351. A suit was filed for challenging the same notice under section 351 on apprehension that pending the decision on the said notice, the Respondent No.1-corporation will demolish the said structure. On 2nd July 1996 a decision of the Division Bench of this Court in the case of Sopan Maruti Topte was brought to the notice of the learned trial Judge. On 8th July 1996 a submission was made on behalf of the Respondent No.1-Corporation in the earlier suit that in view of the decision of this Court, the Plaintiff in the suit was sufficiently protected. In view of the said statement the said suit was withdrawn. Thereafter by order dated 20th March 1998 passed by the Deputy Municipal Commissioner the said structure was held to be illegal.

4. The learned Counsel appearing for the Appellants submitted that in the present suit filed in 1998 even

reply was not filed to the Notice of Motion and written statement is not filed and only on that ground the Notice of Motion should have been made absolute. He submitted that the order dated 20th March 1998 is in fact signed in the year 1994 as is apparent from the zerox copy thereof. He submitted that the earlier 1996 suit was withdrawn on the assurance of the Respondent No.1-Corporation that due process of law as per the decision of the Court in the Sopan Maruti Thopte's case will be followed and in fact reliance is tried to be placed on the order passed in 1994 which is communicated on 20th March 1998. He, therefore, submitted that the order which was prepared in the year 1994 was sought to be served in 1998. He submitted that there is no specific reference to any document produced by the predecessor-in-title of the Appellants in the said order and the said order shows non-application of mind.

5. The learned Counsel appearing for the Respondent No.1 submitted that the order is passed in the year 1994 after considering all the documents produced by Shri Kapoor predecessor of the Appellants. The learned Counsel further submitted that if the Notice of Motion is remanded to the trial Court a reply will be filed by the Respondent No.1-Corporation placing on record all relevant material to show that the order is legal and valid.

6. I have considered the rival submissions. It is contended by the Appellants that the order dated 20th March 1998 was in fact passed in February 1994. On the zerox copy of the said letter/order the date and month are not clearly readable but it appears that the order is signed in the year 1994. On 1st August 1994 the predecessor of the Appellants has submitted a detailed reply to the notice under section 351. On 3rd October 1994 a letter was written by the predecessor of the Appellants to the Deputy Municipal Commissioner recording therein that he had not heard anything from the office of the Deputy Municipal Commissioner and calling upon the Deputy Municipal Commissioner to give a personal hearing. Whether the order is signed in the year 1994 or not is a matter for evidence. If the order was signed in February 1994 obviously the reply dated 1st August 1994 filed by the predecessor of the Appellants to the Appeal is not considered. However, these are all matters to be considered by the trial Court at the time of trial and after examination of record which may be produced by the Respondent No.1-Corporation.

7. The suit is of the year 1998 and all along the impugned structure has been protected by an ad-interim order passed by the trial Court. If the Respondent No.1 is allowed to file reply and the Notice of Motion is ordered to be reheard it will delay the final hearing of

the suit. Considering the fact that from 1998 the suit structure has been protected by interim order of the trial Court, the interest of justice will be served if the suit itself is ordered to be heard expeditiously.

8. Hence I pass the following order:

(i) The Respondent No.1 will file Written Statement to the L.C.Suit No.1680 of 1998 before the trial Court within a period of six weeks from today. The learned trial Judge will hear and decide the suit as expeditiously as possible and in any event on or before 31st March 2006.

(ii) Till final disposal of the suit the Appellants and the Respondent No.1 will maintain statusquo in all respects with reference to the offending structure.

(iii) All contentions of the parties on merits in the suit are expressly kept open.

(iv) The parties and the concerned Court to act on the authenticated copy of this order.

Judge.